Filed 6/23/09 In re B.E. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re B.E., a Person Coming Under the Juvenile Court Law.	B211658 (Los Angeles County Super. Ct. No. CK66733)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. K.W., Defendant and Appellant.	

APPEAL from an order of the Superior Court for the County of Los Angeles. Marilyn K. Martinez, Referee. Affirmed.

Linda Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Denise M. Hippach, Senior Associate County Counsel, for Plaintiff and Respondent.

SUMMARY

On the date of the permanency planning hearing in this dependency case, the mother filed her second petition under Welfare and Institutions Code section 388, seeking return of her three-year-old daughter to her custody, or reinstatement of reunification services and unmonitored visitation.[1] The court denied the petition and terminated parental rights. Counsel objected to the termination of parental rights without an opportunity for the mother to testify, so that she could establish the statutory exception to termination of parental rights which applies when a parent has a continuing beneficial relationship with the dependent child. (§ 366.26, subd. (c)(1)(B)(i).) The court permitted mother's counsel to make an offer of proof regarding the child's bond to the mother, but found the offer of proof insufficient to set the matter for a contested hearing. The mother appealed.

We affirm the juvenile court's orders.

FACTUAL AND PROCEDURAL BACKGROUND

B.E. was detained on January 24, 2007, when she was 22 months old. Her mother, K.W., who had a history of marijuana use and anger management problems, visited B.E. regularly, but failed to reunify with her daughter. Reunification services were terminated on April 24, 2008, the court finding the mother was in partial compliance with her case plan, but that she had not resolved her drug use issues. A few months later, on August 6, 2008, the mother filed a section 388 petition, seeking B.E.'s return or further reunification services and liberalized visitation. On August 21, 2008, the juvenile court denied the petition without a hearing, finding the mother was just beginning to address her long history of substance abuse and it was not in the child's best interest to reinstate family reunification when the child was so close to receiving permanency and stability. This court affirmed the juvenile court's order. (*In re B.E.* (June 22, 2009, B210476) [nonpub. opn.].)

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[1] All statutory references are to the Welfare and Institutions Code.

At the August 21, 2008, hearing, the court set the permanency planning hearing for October 23, 2008. On that date, the mother filed another petition under section 388, again seeking return of the child to her custody or reinstatement of reunification services and unmonitored visitation. She also filed a motion seeking to remove B.E. from her placement with her current caretaker (and prospective adoptive parent), T.H., and continuance of the permanency planning hearing on the ground that T.H. had wrongly interfered with her court-ordered visitation with B.E. The mother further claimed B.E. had told her that T.H.'s husband (who, according to mother, was a long-time gang member and was living in T.H.'s home) had hit B.E. for jumping on the bed. She also asserted that T.H. had not been bringing B.E. to her weekly visits as scheduled (every Wednesday for two hours); she said that, in the six weeks from August 27 through October 2, T.H. did not bring B.E. for three visits, and was late for the three other visits.[2]

The mother's section 388 petition included a letter from the "Be Well Now Institute Inc.," dated October 6, 2008, stating the mother had enrolled in its substance abuse program on August 5, 2008, was making satisfactory progress in her abstinence from marijuana abuse and in her weekly anger management classes, and would complete the program in February. The petition also included a letter dated July 24, 2008, from "Parents of Watts," stating the mother had successfully completed 52 weeks of anger management classes there. The petition asserted that B.E. was very closely bonded to her mother, and "has spent the entire period of dependency wanting desperately to be reunited with her mother, and will be devastated if she is not reunited with her mother."

The Department's status review report for the October 23 hearing stated that the mother had received services from four different organizations, and that it was

[2] On the October 2 visit, the mother was also an hour late; T.H. arrived 20 minutes later. On a subsequent visit (October 8), the mother was late; after she arrived, the mother engaged B.E. briefly with B.E.'s computer, but B.E. spent a lot of time in the reception area talking to the receptionist.

"not clear why mother has changed so many programs . . . ." The report also indicated that the Be Well Now Institute does not provide drug screening. Mother had been set up for weekly drug testing at Pacific Toxicology; she tested negative on July 14, 2008, and then had three "no shows" on July 31, August 5 and August 28. When the Department checked with Pacific Toxicology on October 16, 2008, it was informed that the mother had been automatically terminated for random drug screens after 18 months (as of August 29, 2008).

At the hearing, the juvenile court denied the section 388 petition and terminated parental rights. Matters proceeded in the following sequence:

- The court indicated it was inclined to deny the section 388 petition without a hearing, as it did not believe the petition was timely.
- The court questioned T.H. about the mother's allegations of missed and late visits. The court then concluded: "[w]hile there have been some misses and perhaps some lates and some re-schedules, . . . it would appear even given mother's declaration that the visits for the most part did occur. So I don't need to deny [*sic*] the request to continue this case simply to address visitation."
- As to the section 388 petition, the court observed there was new evidence that mother actually did complete her anger management class. However:
    - "So I will now go back to the issue of the substance [abuse] program. Mother has now been in her program for two months. Given her very long history of substance abuse, given the recency in which she began her program, given the length of time that it will require for her to complete a program and given my long tenure on the bench in dependency court, programs are usually nine months. Sometimes 12. And then there is after care programs. Mother is still just at the beginning to address her long history of substance abuse."
    - As to the claim the child was "very closely bonded" to the mother, the court observed: "These appear to be unsubstantiated statements. I do

not have any evidence to support that this child has desperately wanted to be reunited or that this child will be devastated if she's not reunited. This child is just three years old."

  - The court further observed that: "It is true that a 388 petition should be liberally construed. Nonetheless, mother is at the beginning of her program to address a very long history of substance abuse. She's enrolled in a number of programs and never completed them. . . . [¶]. . . [¶] Mother has not met the first prong. The 388 is denied."

- The court discussed with counsel the mother's claim that B.E. was struck by T.H.'s husband, and counsel's claim there was nothing in the Department's report to show the social worker ever investigated this charge. The Department's counsel stated she had the social worker on the telephone; that the worker did in fact investigate the charge and the worker stated there did not appear to be anyone (other than the caretaker and her children) living in the home; and the worker had no concerns about the quality of care and supervision provided by T.H. (At this point, the court observed the record should reflect "the mother has stormed out of the courtroom.") The Department's counsel stated the worker "has absolutely no concerns about this caretaker and has never seen any bruises, marks. Never heard anything from the child that she had been treated inappropriately and does not give any credence, though, she did [investigate] because it's incumbent upon her to investigate. She did investigate." Counsel for the minor concurred, indicating his office had been to the home and "also has absolutely no concerns about [B.E.'s] care in that home."
- The court then terminated parental rights. It first observed that the social worker's reports "are given great credibility"; T.H.'s home study had been approved; on one recent occasion mother had become very irate and used foul language with the social worker; the mother had missed two weeks of her substance abuse program in October; and mother had missed three drug tests

in July and August. The court found by clear and convincing evidence it was likely B.E. would be adopted; that the child was very well cared for by T.H., who wished to adopt her; B.E. was generally adoptable; and there was no evidence the child had a relationship with her mother such that the child would suffer detriment if parental rights were terminated.

- The mother's counsel then objected to the court's terminating parental rights "without giving me the opportunity to call my client as a witness to testify as to matter that would place her within the [section 366.26 (c)(1)(B)(i)] exception." The court observed that it had given mother's counsel the opportunity to be heard on the section 388 petition, despite its untimeliness, and that counsel did not request, in the alternative, a contested hearing. But because "it's very important that the due process right be protected," the court allowed mother's counsel to make an offer of proof. The offer of proof was that mother had cared for B.E. from birth until her detention; visited at every opportunity; brought educational activities to the visits; brought food to the visits and taught B.E. proper behavior during visits; and had a very close bond with B.E., who was affectionate and happy to see her mother, and told her mother she wanted to come home and live with her and would be very sad if she were unable to do so.
- The court found the offer of proof insufficient to set the matter for a contested hearing, stating in part:

> "Mother no longer and for a year and three quarters has not occupied a parental role. In fact, earlier this year the court issue[d] two temporary restraining orders given mother's extreme issues with anger and an inability to manage her anger issues. [¶] It is not sufficient to simply have a warm, pleasant time. To have a friendly, familiar visit with a parent. What the court is looking for is a parental role where there is frequent nurturing. That there is a strong relationship. So while a friendly or familiar relationship may be beneficial, it is not sufficient to deprive a child of permanency through adoption. The court does not find that the visits which have occurred are of such a benefit to this

> child so as to significantly outweigh the strong preference for adoption. Evidence is not presented that by continuing the relationship means that the child will benefit to such a degree to outweigh the well-being of the child in permanence with an adoptive parent. This court does not have evidence to support that terminating parental rights would deprive this child of a substantial, [positive], emotional attachment with her mother such that this child would be greatly harmed. Being sad is not at all equated with being greatly harmed. It's a question of degree, and while mother argues that the child would be sad, on one end of the continuum, there is no evidence that this child would be deprived nor harmed at all if the court terminated parental rights particularly weighing this with the great benefit and the strong preference for adoption. A child's interest in a stable, permanent placement is the paramount."

The mother filed a timely appeal from the juvenile court's orders.

DISCUSSION

The mother argues the trial court erred in denying her section 388 petition, erred in finding that the continuing beneficial relationship exception to termination of parental rights did not apply, and violated her due process rights when it refused to set the matter for a contested hearing. We find no error.

1. The section 388 petition.

We will not dwell long on the mother's claim that the juvenile court abused its discretion in denying her section 388 petition. The juvenile court denied a virtually identical petition only two months earlier, and this court affirmed that order, concluding the mother did not present sufficient evidence of a change in circumstances, or that reinstatement of reunification services would be in B.E.'s best interests, to justify a hearing.[3] (*In re B.E., supra*, B210476.) Nothing had changed since the juvenile court's previous order, except that two months had passed, and this time the mother showed that she had, some three months previously, completed an anger management course, and had

[3] Section 388 permits a parent, upon grounds of change of circumstance or new evidence, to petition the court for a hearing to change or set aside a previous order. (§ 388, subd. (a).) The court must order a hearing if it appears that the best interests of the child may be promoted by the proposed change. (§ 388, subd. (d).)

again changed drug programs. As the juvenile court noted, mother was still at the beginning stages of addressing her history of drug abuse, did not attend her drug program during the first two weeks of October 2008, and missed three recent drug tests. Again, we cannot disagree with the juvenile court's conclusion that the mother did not demonstrate the requisite changed circumstances, and therefore was not entitled to a hearing.

2. Termination of parental rights.

The mother argues that the trial court should have applied the continuing beneficial relationship exception (§ 366.26, subd. (c)(1)(B)(i)) to termination of parental rights. She is mistaken. We briefly describe the applicable statutory provisions.

At the permanency planning hearing, the court may order one of three alternatives: adoption, guardianship or long-term foster care. If the child is adoptable, there is a strong preference for adoption over the alternative permanency plans. (*In re S.B.* (2008) 164 Cal.App.4th 289, 296-297.) If the juvenile court determines the child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions provided by section 366.26. (*Id.* at p. 297.) One of those exceptions is subdivision (c)(1)(B)(i), which applies when "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." The cases refer to this exception as the "continuing beneficial relationship" exception or the "regular visitation and contact" exception.

The meaning of the child's "benefit from continuing the relationship" was construed in *In re Autumn H.* (1994) 27 Cal.App.4th 567. The court said it meant that "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*Id.* at p. 575.) The court explained:

> "[T]he court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the

> natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.)

In short, the exception applies "only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent." (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.)

On appellate review, we decide whether substantial evidence supports the juvenile court's ruling, reviewing the evidence in the light most favorable to the prevailing party and resolving all conflicts in support of the order. (*In re S.B., supra*, 164 Cal.App.4th at pp. 297-298.) Applying the substantial evidence standard, we necessarily affirm the juvenile court's order. The only suggestion of a "substantial, positive emotional attachment" of B.E. to her mother comes from the mother, who claims B.E. would be "devastated" if she is not reunited with her mother. But there is nothing in the record to support the mother's claim. In the Department's reports of the mother's monitored visits with B.E., there is no indication, for example, that B.E. was ever reluctant to leave at the end of the mother's visits. There were occasions when B.E. stated she was ready to leave before the visit was over, or did not want to go to the mother when she arrived at the visit, or was defiant with the mother and would not stay in the room with the mother. While there is no doubt the mother visited regularly and B.E. was comfortable with her, that is simply not sufficient evidence of a "substantial, positive emotional attachment" such that B.E. would be "greatly harmed" by the termination of parental rights. (See *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324 [even when visits were consistent and frequent, mother did not occupy a parental role, instead occupying "a pleasant place in [the child's] life"; this was insufficient to deny the child a secure and permanent home]; see also *In re S.B., supra*, 164 Cal.App.4th at p. 298, 300-301 [father, who was in full compliance with his case plan and who continued his efforts to regain his physical and psychological health, established the continuing beneficial relationship exception;

evidence showed child displayed a strong attachment to father, was unhappy when visits ended and tried to leave with father when the visits were over].)[4] In short, there is no basis upon which we may reverse the juvenile court's order, which was supported by substantial evidence.

3. Right to contested hearing.

The mother insists, however, that she was denied due process of law because the court rejected her offer of proof with respect to the continuing beneficial relationship exception, refusing her request for a contested hearing on the point; she also complains that the court terminated parental rights before inquiring whether counsel had any evidence or argument to present. Again, we find no merit in the mother's contentions.

First, while the court did proceed to rule on the termination of parental rights without first expressly asking counsel whether he had evidence to present, it did so only after extended discussion of the mother's section 388 petition and her motion to change B.E.'s placement. It is apparent from the court's comments that it believed counsel had had an opportunity to request a contested hearing and had not done so. In any event, any procedural flaw was harmless, as the court then permitted counsel to make an offer of proof as to the testimony he wished to present, clearly recognizing the importance of protecting the mother's right to due process. (See *In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1116 [due process is a flexible concept, and juvenile court "does not deny due process if it requires a parent to make an offer of proof before it conducts a contested

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[4] The mother cites *In re S.B., supra*, 164 Cal.App.4th 289, in which the court held that the parent need not prove the child has a "primary attachment" to the parent or that the parent and child have maintained day-to-day contact. (*Id.* at p. 299.) The mother claims that, because the juvenile court observed that the mother had not occupied a parental role with frequent nurturing, the court "erred in stating the standard required." That is not so. Many cases refer to a "parental role" (e.g., *In re Elizabeth M., supra*, 52 Cal.App.4th at p. 324); clearly the juvenile court's comments cannot be read to have required the "primary attachment" or day-to-day contact which *In re S.B.* properly held were not required. (See also *In re Autumn H., supra*, 27 Cal.App.4th at p. 576 [termination of parental rights would not be detrimental to child because relationship was one of friends, not of parent and child].)

hearing on the issue of whether a parent can discharge his or her burden of establishing a statutory exception to termination of parental rights"].)

Second, the court did not err in concluding counsel's offer of proof was insufficient to require setting the matter for a contested hearing. The proposed testimony from the mother merely repeated points already known to the court in connection with the mother's previous petitions: the mother provided all care for the child until she was detained; the mother visited B.E. as often as she was permitted; during her visits she undertook a parenting role by engaging the child in educational and artistic activities, bringing the child educational toys, bringing food and teaching B.E. proper manners and behavior; and the mother claimed B.E. had a very close bond with and wanted to live with the mother. We cannot disagree with the juvenile court's conclusion that the evidence – including the mother's proposed testimony – simply did not support the proposition that terminating parental rights would deprive B.E. of a substantial, positive emotional attachment with the mother such that the child would be greatly harmed.[5] (See *In re Tamika T., supra*, 97 Cal.App.4th at p. 1122 [juvenile court "can require an offer of proof to insure that before limited judicial and attorney resources are committed to a hearing on the issue, mother had evidence of significant probative value"].) Consequently, there was no error in refusing to set the matter for a contested hearing.

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[5] The mother cites two cases in which the courts concluded that a contested hearing was unnecessary, and then argues that her case is unlike those cases. Thus in *In re Jeanette V.* (1998) 68 Cal.App.4th 811, the court upheld the juvenile court's finding that father's cross-examination of social workers was not required as a matter of due process, even though their reports were in evidence, because the father could not establish regular visitation and contact with the child in any event. (*Id.* at p. 817.) And in *In re Tamika T., supra*, 97 Cal.App.4th at p. 1121, the mother had last visited the child 18 months earlier and had written her two letters since then. While these cases present facts different from this case, where the mother *has* visited B.E. regularly, the pertinent point is that the mother's proposed testimony added nothing of "significant probative value" to the record before the court. (See *id.* at p. 1122.)

DISPOSITION

The order is affirmed.

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BAUER, J.[*]

We concur:

RUBIN, Acting P.J.

BIGELOW, J.

[*] Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.